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COURT OF CRIMINAL APPEALS
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In the Texas Court of Criminal Appeals

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COURT OF CRIMINAL APPEALS
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Maurice Lamar Piper
Petitioner-Appellant

v.

The State of Texas
Respondent-Appellee

From the Fifth Court of Appeals,
Cause No. 05-16-01321-CR

Appealed from the 283rd Judicial District Court
of Dallas County, Cause No. F15-75812-T

Petitioner-Appellant's Initial Brief on Discretionary Review

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The Honorable Rick Magnis
283rd Judicial District Court of Dallas County

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Statement of the Case

In the summer of 2015, Piper shot and killed a close friend. The State charged him with murder (CR: 12; *see* Tex. Pen. Code § 19.02), but, at his subsequent trial, the jury found him guilty of the lesser-included offense of manslaughter and sentenced him to 18.5 years' imprisonment. RR5: 132; RR6: 104.

Before the Fifth Court of Appeals, Piper urged that this is the rare case in which the direct-appeal record shows that counsel provided ineffective assistance—specifically, in (1) failing to request a voluntary-conduct charge instruction and (2) inviting the court to include manslaughter in the charge. The court of appeals disagreed, reasoning that "[c]ounsel is under no duty to raise every defense available, so long as counsel presents a defense that is objectively reasonable or strategically sound." *Piper v. State*, 05-16-01321-CR, 2018 WL 3014578, at *2 (Tex. App.—Dallas June 15, 2018, no pet. h.). Piper did not move the court to rehear the case.

Issue Presented

In concluding that Piper's trial counsel may have had a reasonable strategic reason for failing to request a voluntary-conduct charge instruction, the court of appeals reasoned that attorneys are under no duty to raise every defense available. But counsel did raise a voluntary-conduct defense—he just didn't then ask for the corresponding charge instruction. Did the court of appeals thus err?

Statement of Facts

As shown by the following excerpts of Piper's trial counsel's closing argument, counsel's defense was that Piper's testimony, explaining that he involuntarily pulled the trigger, was truthful:

> Now what establishes credibility? Credibility can be established when you hear somebody you believe them. What gave you an initiative to believe someone? They don't make themselves out to be perfect. [….] Only it was Maurice who came and laid it out for you in a logical concise manner. He told you what he did that was right, but you can really tell that Maurice is being honest with you because he told you what he did wrong. He told you what he's not proud of, and he told you how he hates that this happened.
>
> Yeah, could he have said a bunch of statements about Hardy Wilson to perhaps save his skin? Well, he didn't. Why? Why do you think Maurice Piper didn't make those statements?

> Folks, it's because he's telling you the truth. And if he's going to unlike the State's bag of witnesses, obviously they wanted to get you with—they figure, well, maybe if we bring you more that's better. We brought you a good honest witness.

RR5: 118-19.

> But if we look at the totality of what you've been presented by the State, you cannot really figure out what occurred out there. It is only through Maurice Piper's testimony are you provided a clear insight to what occurred.

RR5: 120.

> [W]ho gave you the most accurate and detailed description of what occurred? Maurice. Maurice got up there, he told you his arm was pulled, he told you the gun went off.
>
> Did he make some fanciful statement like the pull weight or anything? She asked him about the trigger pull weight. He said, "Honestly, I don't know about those things." And he doesn't know about those things. He just answered honestly. I'm sure they're going to try to paint him to be deceivious [*sic*] for just—for saying he didn't know.
>
> …. he's the only one who's shown in this whole situation any remorse or any honesty or any integrity.

RR5: 122-123.

> But what you did hear from Maurice is, he had no intention of using that weapon, none. He wanted to meet Hardy over there. You heard from many witnesses that Hardy advanced at that time. And then you heard—you heard testimony that at that time Dominique grabbed Maurice and the gun went off.

Folks, it is consistent, it is logical.

RR5: 124.

Summary of the Argument

In rejecting Piper's argument that this is the rare case in which the record on direct appeal shows that counsel performed deficiently, the court of appeals reasoned that counsel strategically chose not to argue that Piper's testimony was credible. The record shows, however, that counsel did argue Piper's testimony was credible. In affirming the trial court's judgment, the court of appeals thus conspicuously ignored the record's illustration of trial counsel's defensive strategy.

Argument

> In (1) failing to request a voluntary-conduct charge instruction and (2) inviting the court to include in the charge the lesser-included offense of manslaughter, counsel did not make a strategic decision not to pursue a voluntary-conduct defense. Counsel did pursue that defense.

◆ ◆ ◆

At Piper's trial, the State presented evidence that Piper intentionally shot the victim. Piper testified, however, that though he had pointed a gun at the victim, he involuntarily pulled the trigger when his brother grabbed him by his shoulders. RR5: 85.

Under the evidence presented (and as the State did not dispute on appeal), Piper was thus either guilty of murder or not guilty of any criminal homicide. *See Brown v. State*, 955 S.W.2d 276, 277 (Tex. Crim. App. 1997) (if, while "raising [a] handgun," a person is "bumped from behind by another person," prompting the handgun's "accidental" fire, the shot is not a voluntary act, and a "homicide that is not the result of voluntary conduct is not to be criminally punished"). But the jury found him guilty of manslaughter (RR5: 132) after defense counsel incorrectly

exhorted that that's what Piper's testimony, if credible, required. Apparently, counsel mistakenly conflated the scenario testified to by Piper with one in which a person points a gun at another and, *absent third-party intervention*, "accidentally" fires. *Compare George v. State*, 681 S.W.2d 43, 47 (Tex. Crim. App. 1984) (explaining that that is manslaughter); *Yates v. State*, 624 S.W.2d 816, 817 (Tex. App.—Houston [14th Dist.] 1981, no pet.) (same). This further resulted in counsel (1) failing to request that the jury charge include the voluntary-conduct charge instruction to which Piper was entitled, and (2) inviting the court to include in the charge the unsupported lesser-included offense of manslaughter.

Before the Fifth Court of Appeals, Piper urged that this was thus the rare case in which the record on direct appeal shows that counsel provided ineffective assistance. Br. at 12; *see Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (explaining that deficient performance can rarely be shown on direct appeal). The court of appeals did not agree. Adopting the State's argument from its brief in response, the court reasoned that "[c]ounsel is under no duty to raise every de-

fense available"—every defense, not every charge instruction that comports with a raised defense—"so long as counsel presents a defense that is objectively reasonable or strategically sound."[1] *Piper v. State*, 05-16-01321-CR, 2018 WL 3014578, at *2 (Tex. App.—Dallas June 15, 2018, no pet. h.). And because counsel had not had "an opportunity to explain himself," the court held that it could not know whether counsel's failure was the product of "sound trial strategy."[2] *Id.* at *3.

But we know that Piper's counsel did not strategize not to raise a voluntary-conduct defense. As set forth in the Statement of Facts, counsel's defense was that Piper's involuntary-conduct story was truthful. Counsel just misunderstood the law to mean that Piper was still guilty of manslaughter. *See George v. State*, 681 S.W.2d 43, 47 (Tex. Crim.

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[1] The State had argued that Piper's counsel might have reasonably strategized not to argue Piper was not guilty because counsel might have recognized that Piper's testimony was incredible. St. Br. at 21-27.

[2] The court altogether ignored trial counsel's invitation to the court to include manslaughter in the jury charge: "The issue is whether appellant received ineffective assistance of counsel for failing to request an instruction on one of the defensive issues raised by the evidence. The issue of whether the evidence supported an instruction on the lesser-included offense of manslaughter has no bearing on that question." *Piper*, 2018 WL 3014578 at *3 n. 1.

App. 1984) (when an accused voluntarily engages in conduct that includes a bodily movement sufficient for the gun to discharge a bullet, without more—such as precipitation by another individual—a jury need not be charged on the voluntariness of the accused's conduct); *Yates v. State*, 624 S.W.2d 816, 817 (Tex. App.—Houston [14th Dist.] 1981, no pet.) (affirming manslaughter conviction for defendant who admitted to knowingly pointing loaded gun at victim but claimed that it accidentally discharged). The court of appeals's determination otherwise is simply wrong.

If nothing else, this Court should reverse the court of appeals's judgment and remand this case to that court to consider whether counsel still somehow may have had a reasonable strategy in failing to request the instruction to which his defense entitled him, and in inviting the court to include in the charge the unsupported lesser-included offense of manslaughter. But this Court can quickly resolve that question. *See Mozon v. State*, 991 S.W.2d 841, 848 (Tex. Crim. App. 1999) (Keller, J., dissenting) ("I would not remand this case for the Court of Appeals to articulate what seems to be fairly obvious…"). Ignorance of the law is not a "strategy." *See, e.g., Ex parte Welch*, 981 S.W.2d 183, 185 (Tex.

Crim. App. 1998) (holding defense counsel's misunderstanding of law constituted ineffective assistance of counsel); *Ex parte Chandler*, 182 S.W.3d 350, 358 (Tex. Crim. App. 2005) (recognizing that "[i]gnorance of well-defined general laws, statutes and legal propositions is not excusable and such ignorance may lead to a finding of constitutionally deficient assistance of counsel"). And on the extremely remote chance that counsel feigned ignorance of the law—well, Piper still hasn't found a Texas case that has addressed such a scheme, but the Eleventh Circuit, at least, has said that intentionally misstating the law cannot be a reasonable trial strategy. *See Cave v. Singletary*, 971 F.2d 1513, 1518 (11th Cir. 1992).

This *is* the rare case in which the record on direct appeal shows that counsel performed deficiently. *See Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997); *Goodspeed*, 187 S.W.3d at 392. Piper thus urges this Court to reverse the court of appeals's judgment and remand this case to that court for the limited purpose of considering whether counsel's deficient performance was prejudicial under *Strickland*.

Prayer

Piper prays this Court reverse the court of appeals's judgment and remand this case to the court of appeals to consider whether counsel's deficient performance was prejudicial under *Strickland*.

Respectfully submitted,

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Certificate of Service

I, the undersigned, hereby certify that a true and correct copy of the foregoing document was electronically served to the Dallas County District Attorney's Office and the State Prosecuting Attorney on December 18, 2018.

/s/ Bruce Anton
Bruce Anton

Certificate of Compliance

Pursuant to Tex. R. App. P. 9.4(i)(3), undersigned counsel certifies that this petition complies with:

1. the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(B), because this petition contains 1,622 words, excluding the parts of the petition exempted by Tex. R. App. P. 9.4(i)(1); and

2. the typeface and type-style requirements of Tex. R. App. P. 9.4(e), because this petition has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

/s/ Bruce Anton
Bruce Anton